No. 3906

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

3

AKTIESELSKAPET BONHEUR (a corporation),
Appellant,

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY (a corporation), claimant, of the American Steamer "Beaver", her tackle, apparel, engines, boilers, furniture, etc.,
Appellee.

REPLY BRIEF FOR APPELLANT.

NATHAN H. FRANK,
IRVING H. FRANK,
Proctors for Appellant.

No. 3906

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AKTIESELSKAPET BONHEUR (a corporation),
Appellant,

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY (a corporation), claimant, of the American Steamer "Beaver", her tackle, apparel, engines, boilers, furniture, etc.,
Appellee.

REPLY BRIEF FOR APPELLANT.

In considering respondent's brief we have to remark at the outset that, in our view, many extraneous matters are called to his aid by the respondent, which have no claim to be considered in a judicial determination of the facts.

In the first place, he tries to ring in a patriotic appeal in favor of the respondent. Much time is given to a detail of the chartering committee and of its motives, and odium is attempted to be cast upon the appellant by calling him a profiteerer, that word having become odious to many during the prosecution of the war.

Now, whether the motives of the Shipping Board were good or bad, is utterly immaterial. We will assume that the Shipping Board were actively attempting to do their duty as they saw it. It was WAR, and the seizure of *neutral* vessels in order to get the benefit of the use of them for the American Government, and at a rate below their market value, may be questioned in morals, but whether right or wrong is a question with which we have no concern. As we say, it was WAR, and we assume that all is fair in war. At any rate, we are not considering the ethics of it.

Now, the charge that the appellant was profiteering is likewise immaterial. He was not engaged in the war, nor called upon to favor either party. He was a neutral, and was in trade, and entitled to take advantage of the market, whatever that might be. Furthermore, in this case he was not proposing to profiteer against the government, or in fact against any one; he was in negotiations with Mr. Moore for a charter which was perfectly agreeable to Mr. Moore, the vessel having been in the employ of Mr. Moore for a period of six months previous. If Mr. Moore was satisfied that he was getting the vessel at its market value, the *respondent* has no cause of complaint. It is unfair to attempt to invoke the sympathy of the court for the tort feasor by calling libelant's ship a "profiteerer", or to speak of the owner of the vessel as "defying the Government". He was simply seeking the market rate for his vessel; to which under the law he is entitled. The reasons for the Government's interference are immaterial. Viewed from a purely ethical point of view, the Government was

taking from a neutral its property solely because it had the power to do so and needed the vessel. There is no reason why the neutral should accede to this procedure unless compelled to by force.

So this question of profiteering may also be laid aside as good oratory, but not legitimate argument.

Again, wherever in his brief respondent lacks proof necessary to establish his point, he appeals to the court to take "judicial notice". That is a convenient way to fill out the lack of proof, but "judicial notice" is not taken of the facts with which he proposes to fill out his record.

THE QUESTION AT ISSUE, AND ONE UPON WHICH THE CASE MUST TURN, IS A QUESTION OF BURDEN OF PROOF.

Respondent takes the position that the burden is on the libelant to prove that the vessel would *not* have been prevented by the Shipping Board from sailing under the charter, thus throwing upon the libelant the onus of proving a negative. In fact requiring the libelant to negative the respondent's defense before respondent had established any defense.

In support of this, he cites several cases, and quotes from them, but they do not bear out his contention. Among them he quotes from *The Potomac,* 15 Otto, 630, 26 L. Ed. 1195, and his citation from that case shows the error into which he has fallen. In this case he begins the quotation in the middle of a sentence, and thus an erroneous idea is conveyed as to the meaning

of the decision. For instance, he quotes as follows (Br. p. 10):

> "* * *; in no event can more than the net profits be recovered by way of damages, and the *burden is upon the libelant* to prove the extent of the damages actually sustained by him".

It is not the beginning of a sentence, and is separated from what precedes it by a semicolon. By this means he seeks to place a different meaning upon it from that which it was intended to express. But it only requires that the entire sentence be read to ascertain what is meant by this last half of it. It is as follows:

> "When there is no market price, evidence of the profits that she would have earned if not disabled is competent; *but from the gross freight must be deducted* so much as would in ordinary cases be disbursed on account of her expenses in earning it";

Then follows the matter quoted by respondent:

> "in no event can more than the net profits be recovered by way of damages, and the burden is upon the libelant to prove the extent of the damages actually sustained by him".

This states the rule as we have laid it down in our brief, and which we have followed in our proof.

We are not asking for the gross freight, but we have deducted from it

> "so much as would in ordinary cases be disbursed on account of her expenses in earning it",

precisely as the decision says. (See original brief, pp. 44-45.) And this is all that the court had in mind when using the above language.

So, too, the quotation from *The Conqueror,* as follows:

> "That the loss of profits or of the use of a vessel pending repairs, or other detention, arising from a collision, or other maritime tort, and commonly spoken of as demurrage, is a proper element of damage, is too well settled both in England and America to be open to question. It is equally well settled, however, that demurrage will only be allowed when profits have actually been, or may be reasonably supposed to have been lost, *and the amount of such profits is proved with reasonable certainty.*" (Italics are respondent's.)

Here, again, he has broken the language from its context. It referred to the special facts of the case, which were entirely different from the case at bar. It was a case where NO COMPETENT *proof was made of the value* of the use of the yacht.

This is pointed out by the court in *The North Star,* quoted in our brief, at page 13, where it says:

> "I must concede that some of the language in that case, broken from its context, lends itself to that conclusion, but the decision involved nothing of the kind. It turned upon the dubiousness of the proof of value of the yacht. * * * I see no reason to think that, if the exchange value of the yacht's use in *The Conqueror,* supra, had been established in the customary way, the libelant would have had further difficulty in his recovery."

In other words, the libelant did not make out the prima facie case by establishing a market value, and deducting from that market value the cost of earning it.

So, also, in the case of the *Loch Trool.* The part quoted on page 11 of respondent's brief is based upon

the authority of *The Conqueror* and *The Potomac*. There, again, he quotes (respondent's italics):

> *"The burden of proof is upon the libelant to show the amount of such damages."*

Inasmuch as the rule stated is based upon the authority of *The Potomac* we may assume that it meant to state the rule as *The Potomac* states it. It is to be noted that the court uses the word *"amount* of such damages". It does not pretend to decide that it must negative all objections proposed by the respondent to its recovery when the amount is once established in the usual way, to wit, by the market value, less the cost of earning it. If he did, then *The Potomac* and *Conqueror* are not authority for such decision.

So he cites from *The North Star*, 151 Fed. 168, on page 13 of his brief, the following:

> "In ascertaining whether earnings have been lost by the owner, *the inquiry is not whether they could possibly have been made by the use of the vessel during the period for which he has been deprived of her use but is whether they would have been made.* * * * It suffices if he shows a state of facts from which a court or jury can find that there was an opportunity for him to do so and that he would probably have availed himself of it. *But if it appears affirmatively, or if the reasonable inference from the facts established is, that there was no opportunity, or that he would have refused the opportunity if offered, it is impossible for a court or jury to find legitimately that he has sustained actual loss."*

Now apparently he has overlooked the significance of this misquotation. The rule is laid down that

> "But if it appears *affirmatively* or if the reasonable inference from the facts *established* is that

> there was no opportunity, or he would have rejected the opportunity, if offered, it is impossible for a court or jury to find legitimately that he has sustained actual loss."

But if it must appear *affirmatively*, or if the facts upon which the finding rests must be *established,* respondent must prove it. He cannot merely suggest it, or leave it in doubt, he must show these things affirmatively or establish the facts, and thus the burden is upon him to prove it, and not upon libelant to negative a thing not proven.

We say this is for them to prove in the first place. It is their defense. We have made out a prima facie case by proving her value in the market, and if there be some peculiar reason why we could not obtain the market, it is for them to show it.

These are the only cases cited by the respondent to the foregoing point. The other cases are to the point that the libelant's proof must show the loss of the profits with *reasonable certainty.*

This is not an issue in this case. We admit the rule that it must be proved with reasonable certainty under limitations mentioned in our opening brief, and this we think we have done in our opening case. It does not mean that respondent can by the suggestion of the difficulty in obtaining the market destroy this "reasonable certainty". He must *prove the facts* upon which his suggestion is based, and the question we are now discussing is, upon whom is the burden of proof of these facts,—on respondent to prove it affirmatively? or on libelant to prove it negatively?

There are several other cases cited and quoted from principally of inferior courts and do not apply to the principal question here discussed. They seem to be pointed to the question whether if the court holds that the Shipping Board would have prevented the obtaining of the market price, as proved by libelant, is the court justified in depriving us of the 45 shillings which it is alleged they would have approved but which they allege we would have refused to accept, based upon the fact that the "Brazil" lay idle during the same time? This is a separate matter, and if we are right upon the principal question at issue, need not be considered. We have already treated of this subject in our opening brief.

Among the cases cited, we note the *Wm. M. Hoag,* 101 Fed. 846, which is in direct conflict with the decision of this court in *The State of California,* 54 Fed. R. 404-407, where this court said:

> "The fact that another vessel belonging to the same owner was used as a substitute for the disabled steamer during the time of her detention should not militate against the right to compensation, nor afford just cause for awarding less than would be allowed if the owner, from lack of enterprise or inability, failed to have an available substitute for use in such an emergency."

In the *State of California,* too, this court stated what it conceived to be the rule regarding the certainty with which proof must be made. It was said:

> "The right to compensation for loss sustained by actual detention of a vessel in consequence of a collision with another vessel found to be wholly or partially in fault is settled by numerous decisions and the uniform practice of the courts of this

country, and it is our opinion that the value of the use of the injured vessel during the time of actual, necessary detention is the proper measure of the amount to be allowed. While the evidence in this case does not contain opinions or estimates of the value of the use of the steamship during the time of her detention of persons having knowledge qualifying them to testify as experts, it does show the facts as to the number of days lost while the damages caused by the collision were being repaired, and shows the average daily earnings of the vessel for a period extending from six months prior to the end of six months subsequent to the date of the collision, from which the court could as well determine the capacity of the ship and the condition of the trade in which she was then engaged, and make a fair estimate of the value of her use during the time of her detention, as from expert evidence. *The fact that another vessel belonging to the same owner was used as a substitute for the disabled steamer during the time of her detention should not militate against the right to compensation, nor afford just cause for awarding less than would be allowed if the owner, from lack of enterprise or inability, failed to have an available substitute for use in such an emergency.*"

This should put at rest any question as to the degree of certainty of the proof in the case at bar.

We take the liberty of calling attention to some additional cases of great authority that seem to be determinative of the question raised by respondent. It will be noted that the cases relied upon by respondent are largely inferior court cases. The cases following are from courts of great authority, and if they conflict with respondent's cases they are for that reason preferable and more persuasive than those of respondent.

In *Randall v. Sprague,* 74 Fed. R. 247 (C. C. A.), where a vessel could not have sailed in any event because the harbor was blocked by ice, the court, in allowing demurrage, says:

> "Again, it is claimed that there were no actual damages, because the vessel, if she had been loaded, could not have sailed sooner than she did, on account of a continued blockade of the harbor by ice. The court *directed this last proposition to be reargued, and has given it very careful consideration. We think it is well proven that the Randall could not have gone to sea sooner than she did,* except that possibly she might have been towed out at a disproportionately large expense. Even this is not clear, nor is it clear that the vessel could properly have thus risked her cargo. This brings us to the question of law raised on this point. * * * The libelees cite no instance in which the rule claimed by them has ever been applied; yet there must have been an innumerable number of cases where, on account of adverse winds lasting for some time, existing where and while vessels were detained for loading, it would have applied, if sound. The proposition opens up an unlimited field, as there would seem to be at least equal reason for permitting proof that the port of destination was so blockaded with ice that the vessel could not have arrived if she had sailed, of that adverse winds prevailed which would have obstructed her voyage. It thus illustrates, that, inasmuch as courts cannot easily estimate all the contingencies of navigation, therefore, in maritime matters, *rusticum judicum* is often given, and arbitrary rules often prevail."

Consider in conjunction with this decision, the language of *The Mayflower* concerning whose authority no question is or can be made, referred to in our opening brief (p. 17) as follows:

> "But the evidence given being the best the case affords, and being reasonably certain, I think strict

> justice requires that the party in fault should bear whatever inconvenience or hardships there may be arising out of the attendant difficulties and doubts."
>
> * * * * * * *
>
> "He has no right to fix this inconvenience upon the injured party; and if that party derives incidentally a greater benefit than mere indemnification, it arises only from the impossibility of otherwise effecting such indemnification without exposing him to some loss or burden, which the law will not place upon him."

So, also, *The Mason,* 249 Fed. 720 (our opening brief, pp. 7 & 8), and the *Margaret J. Sandford,* 37 Fed. 152.

So the English House of Lords has spoken upon the subject in no uncertain terms, and these cases are certainly as persuasive as those of inferior courts in this country which are of no more binding authority on this court and less persuasive than is the highest court in England.

In *The Great Holme,* 8 Aspinall Maritime Cases, 317 and *The Mediana,* 9 Id. 41, both decisions by the House of Lords, it was held that demurrage should be allowed for delay consequent on a collision, though no actual out of pocket pecuniary loss could be definitely proved by the owners of the injured vessel. In the former case a dredger, which was the property of a harbor board was injured and, although the work was carried on by other vessels, recovery was allowed. Lord Halsbury there said:

> "That the dredger was required for their use cannot be denied; that their operations in reducing the silting up were delayed by the loss of it cannot be denied. Both these facts are found adversely to the respondents; then why are not the appel-

lants entitled to recover damages for the loss thus sustained? The answer given is that, although their dredging operations were delayed, the appellants, sustained no tangible pecuniary loss. I am not quite certain that I understand what is meant by the use of the word 'tangible'. If by that is meant that, in order to entitle a plaintiff to recover, you must be able to show that, during the period of repair to his vessel, or his cart, or his horse, some specific money has been lost by the period of time during which the article has not been susceptible of being used, the principle so affirmed would, as it appears to me, go very far beyond the particular case now before your Lordships. But to my mind it is a principle for which there is no authority whatever."

In the latter case (*The Mediana*) the same judge (who was the Lord Chancellor) says:

"In this particular case the broad proposition is that the respondents were deprived of their vessel. I purposely do not use the words the use of their vessel. *For the wrongdoer has no right to inquire what or whether any use would have been made of the vessel of which the respondents were deprived.* Suppose, for example, some one went into my house and took away a chair and retained it for some months, could anyone say that I as owner am entitled to no reparation on the ground that I have other chairs or that I was not in the habit of sitting upon that particular chair? The jury's task is often a difficult one in cases of that character, and an arbitrator or jury often has to take an artificial hypothesis; such as in the case to which I have referred what it would cost to hire such a chair. *The broad principle applicable to this appeal is quite independent of the particular use which the respondents would make of the 'Comet'. It is wholly different from a case of special damage, where you have to ascertain the specific loss of*

profit or other advantage which would otherwise have accrued. Where special damage is alleged you must show precisely the nature and extent of the injury sustained, and the person liable must have an opportunity of inquiring into the details before the case comes into court. In the case, however, of general damage no such principle applies, and the jury have only to give a proper equivalent for the unlawful withdrawal of the particular subject-matter."

In *The Astrakhan,* 11 Aspinall Maritime cases 390, demurrage was allowed for deprivation of the use of a Danish war ship and the court uses the following interesting language:

"But I have to ask myself, in this peculiar case, did the Danish Government lose anything by this vessel being laid up for repairs? *It is said that she would, in any event, have been laid up; but, the unforeseen might have happened, and I think in all these cases you should look to see what is the potential use which the Danish Government had for this vessel.* Their potential use was to have her under their control to use if they wanted her; they might have wanted her for Royal purposes, to conduct Royalty about from some place to another, or to receive Royalty, or for fishing purposes, or for any unforeseen purpose which you may imagine. The Government would not have been able to make use of her if these things happened. I do not think I ought to wait, and say 'I must be satisfied that it was required'. If you deprive the owner of the use of a thing, it is not necessary to show that he would have used it but if you put it out of the power of the owner to use it, then, according to Lord Halsbury's reasoning in *The Mediana,* I think you have to pay damages for that."

Again we say, considering these cases in conjunction with

Williamson v. Barrett;
The Margaret J. Sandford;
The Mayflower;
The Mason and
The State of California,

determined by this court, it should not be difficult to determine the rule to be applied in this case. Certain it is, from any view that may be taken of it, that the burden of this defensive matter, namely, that the Shipping Board would interfere to prevent us from securing the market rate, is upon the respondent.

II.

IF WE BE RIGHT IN THE RULE OF LAW APPLICABLE, IT ONLY REMAINS TO CONSIDER THE TESTIMONY OF MR. SMULL TO DETERMINE WHETHER OR NO THE RESPONDENT HAS PROVED IT.

We think we have sufficiently indicated in our opening brief what the final conclusion as to the effect of Mr. Smull's testimony should be.

He expressly admits that he could not say whether the Committee *would,* or *would not,* approve the charter.

> "I don't think it would, but I want to qualify that by the statement that we have never said as a committee what we would do until the charter was put before us." (Rec. p. 193.)

And he gives the reason why. In other words, no single member of the committee could tell what they would do, or would not do. He might give his opinion, but each

member of the committee was required to pass an individual opinion upon each charter, and the majority, of course, rules. Mr. Smull was not the majority.

It will be noticed, too, that the matters referred to by respondent were generally answers to leading questions by his counsel, and consisted in "Yes", or "No". When, however, he was called upon to give a more detailed answer, facts not so favorable appeared.

It also appeared conclusively, that there were no *dis*-approvals, and thus the fact that there were no approvals proves nothing, save that there were no applications.

However, when there *was* an application, they approved "The Transvaal" charter (Rec. pp. 252, 327), a charter of exactly the same character as the Moore charter, for a larger amount, at a date when the board was in better working order and had definitely worked out its plans. At November 3d they had not yet settled upon a fixed course of procedure, and the question had not come up.

Objection is made to the consideration of this "Transvaal" charter, but the fact that they approved it at this late date, particularly when Mr. Smull testifies that four days preceding its approval the board had finally decided that no neutrals could be chartered to merchants, shows that in November preceding there was no fixed rule excluding such charters.

Respondent makes a peculiar argument for the exclusion of the consideration of this "Transvaal" charter party. He says it is beyond the period of the deten-

tion of the vessel, and at a time when, even if material there could be no cross-examination of the chartering committee on it. On that period, and that period alone, was Mr. Smull examined, and he attempts to show that libelant never requested a production of the Board's records for any period beyond January 1, 1918; that we presented the "Transvaal" charter after the deposition of Mr. Smull had been taken. (Br. p. 57.)

This is a peculiar objection, and one that does not commend itself to any reasonable administration of justice. The fact is not disputed, but he says we never asked for it when Mr. Smull was present. The reason we never asked for it is patent; they would not let us inspect the records for ourselves. and we knew nothing of it until after the examination had closed. However, if respondents thought it important that they should have the advantage of re-examining Mr. Smull, in order to ascertain if the offer of the "Transvaal" *spoke the truth* there was no reason why they could not have made application to that end. But what would they examine Mr. Smull on? Mr. Griffiths admitted that it was executed and approved by the Shipping Board and the vessel sailed under the charter:

> "I do not question the charter-party and that that is a true copy. My stipulation does not go to any consent of its materiality. I claim that it is away beyond the period examined into in this case and in the depositions taken in New York." (Rec. p. 253.)

Therefore, we have the fact that it is a true copy of the charter-party, and that it was approved by the committee, and the simple objection is as to its ma-

teriality because beyond the time examined into of Mr. Smull. Well, that is no objection to its materiality,—it is a fact, and it is material to prove that there was no fixed rule under which the Board acted by which it could be determined that they would have *dis*approved the Moore charter. And it further gives some foundation to the claim that the Board was reluctant to allow a full examination of their records because

> "The board is soon to be confronted with voluminous litigation in collision cases and it is to its interest to have the demurrage rates kept down." (Rec. p. 242.)

It may be that other such transactions might be discovered in the records between January 1st and March 18th.

The objection seems to be a withdrawal of the statement made by Mr. Griffiths at the hearing that "All I want is to get at the *truth* about this demurrage." (Rec. p. 124.)

It seems that this charter-party not only fails to support their contention that the chartering committee would have *dis*approved this charter, but as near as can be without action by the Board on the Moore charter itself, proves the contrary,—that they would have approved it. The statement in the brief (p. 57) that

> "The District Court in effect sustained the objection and rightly, we think, gave no consideration to the 'Transvaal' charter party",

seems, in our view, to be a concession that if the court *had* given consideration to the "Transvaal" charter-party, its judgment would have been different. But if

it gave no consideration to that charter-party, it was grievous error.

There being no disapprovals during the time the "Bayard" was detained, and the very first time an application (so far as appears by the record) was made for such a charter, it is *approved,* seems to be very material, inasmuch as it almost compels the inference that had this been presented it also would have been approved.

In considering Mr. Smull's testimony it must also be borne in mind that he was in error in his assumption that they only approved such charters in cases where the vessels were in a foreign trade in order that they might be brought within the reach of the Shipping Board in an American port.

With this we think we can safely leave the subject with the review we have given to Mr. Smull's testimony in our Opening Brief.

They have not only failed to prove that the Shipping Board would not have approved the Moore charter, but we think that the "Transvaal" charter resonably leads to the conclusion that they would have approved it. At any rate, they are far from establishing the defense that they propose.

III.

THE FINDING OF THE DISTRICT COURT ON CERTAIN DISPUTED ITEMS OF DAMAGE NOT INCLUDED IN THE STIPULATED PHYSICAL DAMAGE (Respdt's. Br. p. 93).

These items were for the wages of the watchman during the period of detention and the coal used for

cooking during that time, as well as the wages and victualling of the crew.

It is said by respondent that it was proper to disallow these amounts, as the court found that we were not entitled to demurrage, and that the vessel would have been idle during the repair, regardless of the collision,—that these expenses were not imposed upon libelant; they would have been incurred anyway. (Brief p. 94.)

The answer to this lies in the authority of *The Conqueror,* where the court did not allow demurrage, but did allow precisely the same items which we claim above.

The Conqueror, 166 U. S. 110; 41 L. Ed. 937.

> "The other items of damage, going to make up the aggregate amount awarded, included about $4500 for the wages and provisions of the crew and also for wharfage, towage, night watchman, and extra expenses in heating the vessel,—all of which are claimed to be unauthorized, in view of the fact that by U. S. Rev. Stat. Sec. 829, the marshal is allowed, 'for the necessary expenses of keeping boats, vessels or other property attached or libeled in admiralty, not exceeding $2.50 a day.' While it is entirely true that the marshal is thus limited, it does not follow that the libellant may not incur a larger expense if, in his opinion, it is necessary for the proper protection of the vessel, subject to the contingency of paying for it himself, if he be unsuccessful."

The court then reviews the facts, and says that it does not find anything in the testimony or in the circumstances of the case to warrant the conclusion that the expenses of keeping such a vessel while in the collector's or marshal's possession, were extravagant, and inasmuch

as the Commissioner found that they were proper, and the District Court and Court of Appeal affirmed his action in that regard, they were not disposed to disturb their finding although the amount seems large.

IV.

THE RESPONDENT SAYS THAT LIBELANT MAKES NO CLAIM FOR DEMURRAGE BASED UPON THE RIGHT TO BERTH ON OWNER'S ACCOUNT (Respdt's. Br. p. 71).

But in this claimant is mistaken. The Moore charter is simply used to prove the market value of the ship at that time. The berthing of the vessel is for the same purpose proven that the court can see what the market value of the vessel was. Both are to be taken into consideration by the court and that one adopted which in the view of the court is better suited to the purpose. In our brief (p. 16) we expressly said:

> "However, we deem it immaterial, insofar as fixing her market value is concerned, that the charter was not entered into. Being an offer in good faith in a competitive market, for the use of the vessel by a party in whose employ she had been for a period of about six months just preceding the collision, the offer fixes definitely, and with more than 'reasonable certainty', the market value of the use of the vessel at the time of the collision, and in the consideration of this question *the time of the collision*, November 3rd, *is the time when respondent's liability became fixed.*" etc.

Again, on page 44:

> "We think therefore we have disposed of the suggestions of the defense by which they hoped to de-

prive us of the market value of the use of the vessel during the period of repair, and we have only to figure the amount.

"We will place before the court the figures showing the *different methods under which that amount can be arrived at.*"

"There can be no doubt of the *market* value of this at that time."

"The offer of $400,000 fixes the market value."

Again (p. 47),

"There can be no question fairly made as to our claim of the market value of the use of that vessel during the period of detention, and under the law it is the market value that determines our recovery."

In view of the foregoing, we do not see how respondent could possibly have come to the conclusion that we make no claim for demurrage based upon the right to berth on owner's account.

We claim demurrage based upon the market value of the vessel, and the right to berth on owner's account is one of the means of proving that market value.

Answer to Propositions in Respondent's Appendix.

We will first take up the question discussed in Proposition D (Appendix p. XX), namely,

"the libelant neither used overtime nor double shifts in repairing the 'Bayard'."

Respondent strenuously urges that overtime should have been worked in the repair of the vessel, and that

it should have credit for the difference between the extra cost of such overtime, and the daily demurrage for the days, if any, that might thus have been saved.

This proposition rests, as we shall presently see, upon the familiar game of chance, "Heads I win, tails you lose"; for, if it turns out to respondent's advantage, he will adopt it, while if to his disadvantage, he will reject it, and we would have no recourse.

But as we have already suggested, the claimants are foreclosed with respect to this question by *their agreement,* to say nothing of the practice in such cases, to which we shall presently refer.

The agreement was that the vessel should be

> "repaired by the Union Iron Works Company *on the basis of time and materials at going rates,* the owners and *underwriters* of the 'Beaver', if that vessel is ultimately held liable for the collision, will not question the propriety of that method of repair. * * * To further eliminate so far as possible controversy over the character of repairs to be made, we suggest that it would be well to permit the *surveyors for the owners and underwriters* of the 'Beaver' to join with its surveyors for the owners and underwriters of the 'Bayard' in preparing specifications for the repairs." (Rec. p. 17.)

In view of a discussion with counsel of the relation of the Underwriters to this question which took place during the taking of depositions (Rec. pp. 268, 279, 280), we take this occasion to call special attention to the fact that, under its terms, this agreement was an agreement on behalf of both the owners and *underwriters,* and that the surveyors therein are specially mentioned as surveyors for both the owners and underwriters.

Under these circumstances, the surveyors were the agents for the respondent for the purpose of seeing that those repairs were properly and economically made. Not having offered any objections to the mode of repair at the time when they should have made such objections, they are now estopped from raising the same, because it is a change of position, at our cost and expense.

Moreover, straight time is the usual and ordinary method of making repairs. Overtime is very much more expensive. It is more expensive from two points of view: First, the double pay to the workmen, and, second, by reason of the decrease in the efficiency of the workmen, in that they do not accomplish as much in a given time as they do upon straight time. This is a well settled economic principle.

Under these conditions, had we worked overtime, there is not the possibility of a doubt but what the respondent would have contested our right to recovery for the repairs, basing their contest upon the increased cost of overtime. The proof of this lies in the testimony to which we shall presently refer.

Moreover, the *agreement* is for repairs on the basis of time and material, *at going rates.* The ordinary method of repair is straight time, and the going rates, straight rates. The underwriters recognize and pay for nothing else.

So, also, the language of the agreement is the *language of the respondent himself.* Had he meant to vary the ordinary method of repair by requiring us to work overtime, he should have said so. The agreement was entered into for the purpose of eliminating con-

troversy over the expense of the repairs. The purpose of the agreement, as stated by Mr. Griffiths, is as follows:

> "There is an agreement between the parties that the repairs should be made by the Union Iron Works, and that the repairs, if so made, *should be without question at the cost or time, if made at the going costs and going time by the Union Iron Works.*" (Rec. p. 15.)

Yet in support of his objection he contends that

> "if this vessel was, as the libelant claims, free to sail and had up to her a charter, which was worth something like $4000 a day, then overtime should have been used upon the repairs to the vessel." (Rec. p. 15.)

To this we reply that, if so, namely, if the fact that the rate of demurrage was high, should have spurred us to the use of overtime, then it should have spurred the respondent to suggest the use of such time, and agree to it, not leave the responsibility of taking chances of their agreeing to it, upon us. They knew as well as we knew, that the rate of demurrage would be high. It was not necessary for them to know of this particular charter. The going rate on berth was $70 a ton, while her measurement cargo capacity was 7500 tons, or $525,000.

So, also, departing from the specific figures, respondent must have known, as everyone else knew, what was testified to by Mr. Page, namely, that charter rates were high, and going higher. As said in December, 1916, by the Circuit Court of Appeals, 4th Circuit, in *The Orion,* 239 Fed. 303:

> "All the world, even a judge, knows that freight rates have been steadily rising ever since the fall of 1914, and that every ship which could safely float, has been in constant demand."

It cannot be assumed that the respondent, itself a ship owner, or its agents, the surveyors, did not know the great value of the time of the vessel, and if so, they should have raised this question at that time. Indeed, they were advised of this by the libel, which alleges the damages would exceed $200,000, and which was filed November 12th, in the early stage of the repairs. They had themselves figured the cost of repairs at $70,000, leaving the balance for the demurrage claim and incidental expenses.

Under those circumstances, how can they have the hardihood to attempt to charge us with responsibility for not doing something which their language does not import, and which their surveyors did not require. Every consideration of justice and fair dealing is against them, as well as is the law.

But let us examine the evidence of their own surveyors, called for the purpose of charging us with this overtime.

First, let us refer to *Capt. Bryn,* Rec. p. 39:

> I am familiar with the agreement read to the Court, and acted under it. At that time Mr. Blackett and Mr. Evans represented respondent in this case. They were present during the entire time of the repairs, were there all the time.
>
> "Q. Now, what, if anything, did you do with regard to consulting them as the repairs went along, as to the manner in which they should be made, the nature of the repairs, etc.?

A. I kept them fairly acquainted with the repairs as they were going on, and both of these men were down at the Union Iron Works, where they had their work at the same time in other ships as well, and they came down and looked at my ship once in a while.

Q. During that time, was any suggestion made by either of them that the repairs were not proceeding in the manner in which they desired or which was most beneficial to the parties?

A. No, there were no remarks made.

Q. So far as you were concerned, how were they proceeding with it—with diligence or otherwise?

A. Yes, we were going on as energetically as possible, and always working in *conjunction with the 'Beaver' people; they always had the say in the matter; we allowed them to go over there and check up everything, all of the amounts and everything.*

Q. In other words, you were proceeding upon the assumption that they were going to pay the bills and they should have the say as to how the repairs should be made?

A. Yes."

Now, Mr. Blackett, representing the respondents, takes the position that he was only appointed to indicate what repairs should be made in accordance with the specifications, and that beyond this, he had no authority to direct them as to the manner in which the work should be done.

Nevertheless, he admits that overtime on a repair job is a matter of *special arrangement;*

> "Usually all parties connected with the case, and representing the various interests are consulted in the matter." (Rec. p. 267.)

That

> *"Underwriters only pay straight time."* (Rec. p. 267.)

In this connection, a discussion arose between counsel as to the materiality of the fact that the defense in this case is made by the Underwriters. (Rec. pp. 268-69.) There is no denial but what the Underwriters are defending in the name of the San Francisco & Portland Steamship Company, but it is insisted that that fact is immaterial.

However, the agreement between the parties regarding the repairs makes the Underwriters a party to said agreement. In the first paragraph of that agreement, we find the following:

> "the owners and *Underwriters* of the 'Beaver', if that vessel is ultimately held liable for the collision, will not question the propriety of that method of repair,"

and in the second paragraph,

> "we suggest that it would be well to permit the *surveyors for the owners and the Underwriters* of the 'Beaver' to join with the surveyors for the owners and Underwriters of the 'Bayard' in preparing specifications for repairs". (R. pp. 323-324.)

It, therefore, seems conclusive, that though Mr. Blackett tries to avoid the position of being a representative of the Underwriters, he nevertheless, by the very terms of the agreement, has become their representative, and as he admits that the Underwriters only pay straight time, and that overtime is a matter of special arrangement, where all the parties connected with the case and representing the various interests are consulted, and, as he further testifies (Rec. 267):

> "For instance, if I were representing the Underwriters direct in the case, not watching a case on

behalf of them, but actually handling a case for them, I would *suggest* overtime."

It would seem that, in default of such suggestion by this representative of the Underwriters, there is no recourse for the owners, except to employ straight time; that if the Underwriters desired a departure from the understood condition, viz.: that "the Underwriters only pay straight time", it was their place to suggest the change from that condition.

So, too, Mr. Evers the other surveyor for the respondents ["Owners and Underwriters"], is asked (Rec. p. 278):

"Q. Was any effort made so far as you could discern, on the part of the owners, or the representatives of the owners of the 'Bayard', to speed up the repairs?

A. Well, they never asked to work overtime, if that is what you allude to, they never asked it.

Cross-Examination.

Mr. Frank. Q. And you never suggested it?

A. No, sir; I never suggested it; I am not supposed to suggest it.

Q. In the case of the 'Beaver' you say you had consultations as to whether or not overtime should be used?

A. I wish to correct myself a little there. I consulted with the owners of the vessels, and they said they wanted to work overtime, on it. Then I asked the Underwriters' surveyor and *he made me show him how I could save the time,* and I showed him how by working overtime we could save the time, and then we went along with it so as to get the vessel out.

* * * * * * *

Q. That is, if the owners had insisted upon it, you would have done it, and the owners would have had to take their chances for the overtime?

A. Yes, and that would have been settled by the Average Adjusters at the finishing up of the business; it would be my argument against his.

Q. In other words, they would take the chance of the Underwriters accepting it, if it turned out to their advantage, but if it turned out to their disadvantage, they would not accept it; is that right?

A. *Yes; the Underwriters would have objected to paying it.*

Q. Because straight time is understood to be worked?

A. It is what the Underwriters guarantee to pay.

* * * * * * *

Q. That simply amounts to the fact that there is a special arrangement between the parties, if the parties agree that they shall go on and do the work on time and material basis, it is understood that it is straight time." (Rec. p. 279.)

After another discussion between counsel respecting the Underwriter's participation in the defense, the witness answers (Rec. top of page 281):

"A. Unless the owners want to work overtime.

Q. If they have such an agreement—unless they have a special agreement to work overtime it would be straight time, would it not?

A. Yes, unless the owners insist upon *working on their own and paying for the extra themselves.*

Q. And paying the extra themselves?

A. *Sure.*"

* * * * * * *

"Mr. Frank. Q. If any two parties agree that it shall be done on time and material basis at going rates, it is understood by that agreement that it is straight time; if one man agrees to pay for certain repairs to be done on time and material basis at going rates, it is understood, unless there is some special arrangement, that that is straight time?

A. That is true." (Rec. p. 281.)

Again (Rec. p. 282):

> "Q. And if I make an agreement with you that I am going to make the repairs—and I am not the Yard—you and I have a controversy as to which one will pay for it and I make an agreement with you, in which you agree to pay for the repairs, if I have it done on time and material basis at going rates, you understand that that is straight time, do you not?
>
> A. I understand that that is straight time."

This would appear to settle the question of the obligation of the libelants to work overtime.

However, another fact appears, which is even more conclusive:

Mr. Siversen, the representative of the Union Iron Works, supervising and directing the Iron Works in the work of repair, testifies, on cross-examination by Mr. Griffiths:

> "Q. Did the owners, or the owners' representatives, ever suggest to you during the repairs on the 'Bayard' that there was any hurry to get the 'Bayard' out?
>
> A. They wanted to get the 'Bayard' out as quick as they could.
>
> Q. Did they say that?
>
> A. I think they made the request that they wanted to get the 'Bayard' to sea not later than the 6th of December, as far as I remember, *but we were not able to do it.*" (Rec. p. 291.)

Again (Rec. p. 288):

> "Q. What, if anything, can you say concerning the conditions at the Yard with respect to men available for this work, for an extra shift at night time?

A. I know that we were very busy at the time, and we had not sufficient men for a double shift, in the first place; in the second place, it is very difficult to get the men to work a double shift on a straight eight-hour basis; in cases where you can get the men to work a double shift, they insist upon working 11 hours.

Q. At any rate, you did not have the men available, I understand, for a double shift?

A. No."

RE-DIRECT EXAMINATION (Rec. p. 292).

"Mr. FRANK. Q. They were proceeding along with all the diligence they could, were they not?

A. Yes.

Q. Except that they did not use overtime?

A. They did not use overtime.

Q. You say you can usually arrange to give men for overtime, but in this particular case you said you could not do it?

A. We were not asked to do it.

Q. You said you could not put on two shifts?

A. We could not put on two shifts if they had wanted it.

Q. And as I understand it, they told you they were anxious to get the ship not later than December 6th, and you were unable to get it to them even by that time?

A. I should probably not be so positive regarding the date, but I know that it was more than a week sooner than the vessel was delivered; we tried all we could to do it, but we were not able to make it.

Q. In other words, they were anxious to get the vessel as soon as they could?

A. Yes, sir."

RECROSS-EXAMINATION.

"Mr. GRIFFITHS. Q. Who told you they were anxious to get her out in a hurry, who actually told you that?

A. Captain Bryn."

So we see, that with regard to the overtime, an agreement was made, which agreement fixes the manner of doing the work, both as to time and material. That agreement was with both the owners and the underwriters; that they had representatives or surveyors there superintending the work; that the owners of the "Bayard" were working as expeditiously as they could; that they were anxious to get the vessel out, but the Iron Works were unable to give them the extra shifts to expedite the work, and that no suggestion was made by the respondents or the insurers that the course pursued was not satisfactory; that the "owners of the 'Beaver' always had the say in the matter." That they were "allowed to go over there and check up everything, all of the amounts and everything", and made no suggestion that the work was not being done as expeditiously as possible or was not being done in accordance with their agreement. Moreover, that it is the custom that unless overtime be mentioned, straight time is understood, and that the underwriters paid for nothing but straight time, and this agreement was with the owners and *underwriters.*

They are bound by their agreement as well as by usage.

In view of the foregoing facts, it shows a disposition on the part of the respondents to be unfair in the position they take upon this subject.

And while we are upon this subject,—the inference from the brief is that the respondents claim some credit for having admitted liability. We wish in this connection to call attention to the fact that they did not assume the liability until the deposition of their master,

Captain Rankin, proved that upon the facts they had no ground to stand upon. (See Cross-Ex. pp. 144 to 157.) When they filed their answer they denied their liability; that was on December 13, 1917. (Rec. pp. 10 to 13.) Captain Rankin's deposition was taken May 10, 1918 (Rec. p. 157), and the trial began June 17, 1918.

Suggestions to refer to Commissioner.

The respondent makes several suggestions looking to a reference to the Commissioner to fix the amount of demurrage.

Before the court lends a willing ear to these suggestions, it should take the following facts into consideration:

This case has been pending for five years, having been begun November 12, 1917.

It was tried in open court June 17, 1918.

The result of a reference to the Commissioner, and the appeal that most certainly might follow, might take another five years to determine the issue.

The respondent has had full opportunity to try those issues, and deliberately refrained from doing so. On the contrary, after a full submission of all the testimony affecting the question of demurrage, desired by either party the cause was submitted.

Upon the submission of the cause (Rec. p. 252), the question of taking testimony relating *to overtime and the work on the engines* was reserved to be taken the following day in depositions (Rec. p. 255). Accordingly, on the following day the respondent called its witnesses

and took the proposed depositions of Joseph Blackett and Frank H. Evers, followed by the testimony on behalf of the libelant of L. K. Silversen *and the testimony on that subject was taken* (Rec. pp. 258-303).

It was also on the submission agreed that if the parties could not agree upon the physical damage, that would be referred to the Commissioner (Rec. pp. 255-56). Agreement was entered into respecting the physical damage, the case finally submitted, and arrangements made regarding the filing of briefs.

Respondent not only had the opportunity to take this matter up, but he *did in fact take all the testimony he desired to take on the subject, and submitted his cause with the question fully presented, or at least as fully as he desired.*

Moreover, if he had wished to take further testimony upon the subject, he had the opportunity upon application to this court at the time of the appeal to take testimony, when the libelant would have been heard upon the question, and the court would pass upon it. He allowed this opportunity also to go by, *evidently satisfied with his case as it was.*

Now he has the boldness to suggest to this court that if it referred the matter to the Commissioner to take further tetimony, he would be able to prove

> "a net saving by the use of double shifts of $104,-722.31",

and that he calculates that

> "after allowing for additional labor cost, overtime would have yielded a net saving of $69,129.77", (Appellee's br. pp. xxii, xxiii), a total saving of $173,000.00.

If there would have been any such saving he would not have refrained from making the proof *at the time of taking the depositions* for that purpose. The figures are ridiculous on their face and apparently are suggested with the purpose of moving the court to make the reference. He says they

> "are of course only approximate and are given here simply to indicate that the savings would have run into very real figures"
>
> (Br. p. xxiii) and he assumes that if demurrage be allowed,
>
> "the amounts will naturally go from the court below to the Commissioner".

Under this state of facts, it would be eminently unfair to permit the respondent to re-try the case, especially since the libelant's witnesses are beyond its reach. The vessel is a foreign vessel, and unquestionably the crew are now scattered. As a matter of law the suggestion is untenable, and as a matter of equity, if there be any in favor of their suggestion, it is more than overborne by the equities against it. A party with a full opportunity of raising the question suggested, is not permitted to sleep upon his rights, and years afterwards to recall them when his opponent is at a disadvantage with regard to the defense which he might otherwise have had.

The same suggestion applies to the proposed deduction of one-third on account of owner's repairs. (Br. p. xix.)

C.

PROPOSED DEDUCTION OF ONE-THIRD FOR OWNER'S REPAIRS.

The argument on this point opens with the statement that the District Court *found the fact* that the repairs made by the owner were not made necessary by the collision.

This is a statement founded on what we deem a misconstruction of the language of the decision. The court said that,

> "The fact that other repairs, not necessitated by the collision, were made, but which did not delay the completion of the repairs so necessitated is, as I view the case, immaterial." (Rec. p. 303.)

In other words, he stated the contentions of the parties on the subject,—the respondent that repairs were made not necessitated by the collision, and the contention of the libelant that they "did not delay the completion of the repairs so necessitated", and laid it aside as immaterial.

The respondent says that the lower court held it immaterial

> "in the view that the court took of the case, namely, that no demurrage was due".

He is placing his own construction upon the language of the court. The court gave no reason for stating it immaterial. It is quite as open to the construction that, regardless of the question of demurrage it was immaterial, because even with the demurrage question under consideration, it did not affect the legal rights of the parties.

The statement of facts following this statement (Br. p. xiii) is equally open to criticism.

It is true the "Bayard" made the repairs mentioned, but when we examine the testimony to see under what conditions and for what purpose they were made, we see that the statement made by respondent is qualified by the testimony in important particulars.

The repairs are repairs that would NOT *have been made but for the collision,* and were made because the owners apprehended that, *as a result of the shock,* there might be damage to the engines not apparent upon the surface, which they would have found when at sea and which would have rendered her unseaworthy. They therefore took them apart for examination, and while they were not allowed to include them among the material damage found by the surveyors, they deemed it necessary for their own protection not to rely upon the opinion of the surveyors, but to determine the question for themselves.

> "Q. Was there anything necessary to be done to ascertain whether or not the collision had effected the engines?
>
> A. In our opinion there was, because the shock was so strong that one of the men who was aft was thrown out of his bunk at the time of the collision, and both the chief engineer and myself insisted upon having the engines thoroughly overhauled and opened up; so we had to go to that expense and do it.
>
> Q. What was the nature of the injury that you apprehended from that shock?
>
> A. Some cracks or something thrown out of place."
>
> (*Bryn*, Rec. p. 41.)

Mr. Blackett, the Underwriter's Surveyor, did not consider this necessary, though the claim was at the time submitted to him in the form which Captain Bryn has stated. (Rec. p 266.)

Mr. Evers, another Underwriter's Surveyor, while not answering the question categorically, namely, whether that overhauling was required by reason of the collision, simply says:

> "We recommended nothing because of the collision on the engines,"

and simply testifies that when they did overhaul them, they were

> "Very dirty, indeed, needed overhauling for dirt."

That is all that he says upon the subject.

The most of the matter referred to by the respondent as to the work upon the engines is found in the testimony of Mr. Silversen, and his language throws a somewhat different light upon the subject from the language used by respondent.

He is asked:

> "Q. What was the other work? Tell us what was done with respect to overhauling the engines?
>
> A. They opened up all the cylinders *for examination* and they fitted on new piston rings; I think they refitted the cross-head brasses, *just took them down and looked them all over; the* crank pin brasses, as well, *were also taken down and examined;* the auxiliary engines had new foundations installed under them.
>
> Q. Anything else?
>
> A. There were a number of minor jobs; those were the principal things.

Q. Were the engines cleaned up thoroughly?

A. *Naturally, in a case like that, where there is so much work done, there is a great deal of dirt generated, and that naturally had to be cleaned up.*

Q. They naturally took advantage of the chance to clean the engines out and put them in good order; is that a fair statement?

A. What do you mean, the interior portion, or the exterior portion, of the engine-room, or what?

Q. Both.

A. The exterior of the engine-room, down around the engines was cleaned up.

Q. How about the engine-room?

A. *Naturally, when you remove a piston for examination there is always more or less dirt that has to be cleaned up.*'' (Rec. pp. 293-94.)

* * * * * * *

''Q. Did they do anything with reference to examining the shafts for their alignment?

A. My recollection at the present time is that the survey, or the recommendation of the surveyor called for an exterior examination of the engine and its foundations, as well as the alignment of the shaft, and that was done.

Q. And that was done because of the likelihood of injury due to the shock from the collision, wasn't it?

A. I think that is the reason that they put forth for it, yes.

Mr. Griffiths. Q. Whom do you mean by 'They'?

A. The surveyors. The surveyors collectively wrote up a specification or work list that we were to carry out, and we carried out the work that was enumerated on that work list.'' (Rec. pp. 296-97.)

* * * * * * *

''Q. * * * After a collision of that kind and you know from the damage what the nature of the collision was, would you consider it a prudent thing on the part of a shipowner to take his ship out without satisfying himself that the engines and connections have not been injured by the shock?

A. No, I think the owner is justified in making all possible examination to see that nothing has happened, because once he goes to sea things might give out that they do not anticipate, and he might have considerable trouble." (Rec. p. 298.)

So we see the material facts are, that these were made for the purpose of examining the engines for possible injury that may have occurred to them by reason of the collision. It was a matter of prudence that they should be examined.

Even though the surveyors would not recommend them to be charged against the Underwriters, the owners could not take the risk of letting the engines go without being satisfied that they had not been injured by the collision.

Much is attempted to be made of the fact that they were cleaned, but while no doubt in the course of the examination some cleaning was done, it is plain that most of it was the accumulated dirt and grease that would remain there largely the result of the work. It nowhere appears that the work was work contemplated by the owners before the collision took place, or rendered necessary before the collision took place, or that the owners would have detained the vessel for that purpose had it not been in collision. It affirmatively, however, appears that the owners feared the effects of the collision on the engine, and took the engine apart as a precautionary measure against undisclosed trouble.

Under such circumstances, the rule which respondent invokes would hardly apply, namely,

"While two sorts of repairs are going on simultaneously for the account of two different persons,

justice requires a division of the common expenses." (Br. xiv.)

Neither is it the law, either American or English, that the vessel's time should be apportioned under such facts as these.

The main authority cited and quoted by the respondent to support its contention that a reduction of the demurrage charges should be made, for the reason that the ship was undergoing the owner's repairs at the same time the other repairs were under way, is

The Sequoia, 132 Fed. 625 (Dist. Ct. Northern Dist. of California, De Haven, J.).

With respect thereto, we desire to draw the court's attention to the whole decision, and in particular to the important fact that in that case repairs on the steamship "Cleveland" were *commenced before the collision occurred and would have proceeded to completion had the collision never taken place.*

A further quotation from the case, beyond that supplied in respondent's brief, is necessary to a correct understanding of the decision, as follows:

> *"It further appears that at the time of the collision certain necessary repairs to the boilers and machinery of the 'Cleveland' were being made.* These repairs were to have been completed on May 31st, but were not because it was apparent that the steamer would necessarily be detained beyond that date on account of the damage caused by the collision. While this damage was being repaired, the necessary repairs which but for the collision would have been completed on May 31st were proceeded with, and in addition to these, the owners of the 'Cleveland' had other repairs made during

the same time, which, while they may not have been then absolutely necessary to render her seaworthy, were yet of a substantial character and of benefit to the steamer. The making of these latter repairs consumed about one week, but did not interfere with or delay the repairs made necessary by reason of the collision.

* * * * * * *

The owner is entitled to demurrage for the time the vessel is necessarily detained while undergoing such repairs; that is, he is entitled to the value of the use of his ship during that period. But manifestly this rule would not be just under the *peculiar circumstances* of this case, because a portion, if not all, of the time she was delayed on account of the collision, the 'Cleveland' was undergoing other repairs which were beneficial to her.

It may be that these repairs would not have been made at that time except for the fact that the steamer was under detention because of the injury received by her in the collision with the 'Sequoia', but nevertheless the repairs made were substantial *and must have been made some time in the near future.*"

The John F. Gaynor, 124 Fed. 743, 130 Fed. 856, is not in point, as is shown by appellee's brief, for the reason that the survey was primarily caused by damage both from collision and stress of weather, and there was therefore only an apportionment of the damages to the causes, and it does not refer to the principle contended for by the respondent.

In the case of *The Bratsberg,* 127 Fed. 1005, it appears that the cost of the survey and docking charges were divided between the parties for the reason as stated by the court that

"Other repairs not made necessary by the stranding were made at the same time, and the English

rule which divides the damages under such circumstances seems to be fair and equitable''

citing *Marine Insurance Co. v. China S. S. Co.*, 6 Asp. 68, and *Ruabon S. S. Co. v. London Assurance Co.*, (1897) 2 Q. B. 456, 1900 App. Cas. 6, which latter case discusses the questions involved and lays down the English rule as follows:

Halsbury, L. C. (page 9):

> ''The agreed facts may be very shortly stated. The Steamship 'Ruabon' having been placed in dock for the purpose of repairs for which the underwriters were liable, while she was in dock the owner took advantage of the opportunity to have the vessel surveyed. It is part of the agreed facts *that the holding of the survey added not a farthing to the cost or a moment to the period of time during which the execution of the repairs proceeded;* and the question raised is, whether the owner of the vessel is responsible on any reason known to the law to bear part of the expense involved in the docking of the vessel and keeping her there while the repairs were being executed.''
>
> * * * * * * *

(page 11):

> ''It cannot be denied that the underwriters here were themselves bound to incur all the liability that they did incur, and that the shipowner was under no such liability. There is here no joint ownership which makes a liability upon all partaking of that ownership, and which liability, each is under an obligation to some third person to fulfil.''
>
> * * * * * * *

(page 12):

> ''But this is the first time in which it has been sought to advance that principle where there is nothing in common between the two persons, except

that one person has taken advantage of something that another person has done, there being no contract between them, there being no obligation by which each of them is bound, and the duty to contribute is alleged to arise only on some general principle of justice, that a man ought not to get an advantage unless he pays for it. So that if a man were to cut down a wood which obscured his neighbor's prospect and gave him a better view, he ought upon this principle to be compelled to contribute to cutting down the wood. Or if a man built a wall so as to shield his neighbor's house from undue wet or danger from violent tempests, he ought to be entitled to contribution because his neighbor has got an advantage from what he did."

* * * * * * *

(page 13):

"But it remains to consider whether the case is not covered by authority. That supposed authority is to be found in what has been called *The Vancouver Case—The Marine Insurance Co. v. China Transpacific Co.* (11 App. Cas. 573). My Lords, I cannot think that that case *establishes any such proposition as is insisted on here. In that case the sole question was whether a particular average loss sustained by the respondent exceeded 3 per cent.* within the meaning of the warranty."

* * * * * * *

(page 15, referring to *Marine Ins. Co. v. China T. Co.*):

"Lord Macnaghten. * * * It was not decided that the shipowner was liable for one-half the cost of the use of the dock including docking charges, but that the underwriter in respect of his obligation was liable at least for *one-half* of the cost. *That was enough in the particular case to give the victory to the shipowner*, and in this House as respondent he could not have asked for more."

By the decision it was held that the shipowner was not bound to contribute to the expense of the dry-docking.

The respondent quotes from the case of

The Acanthus, 85 L. T. (N. S.) 696; 9 Asp. 276,

but a further quotation is necessary to obtain a correct understanding of the case:

> "It comes to this, that a person is not bound to contribute unless there is some legal obligation on him to do so. The mere fact that he gets an advantage from the opportunity which he has taken, although it may give rise in some person's mind to a general idea of general justice or good sense, or *one of those vague propositions which are sometimes invoked*—although it may be said on those grounds that a man who gets a benefit ought to pay for it, the Lord Chancellor points out that that is not sufficient to impose a legal obligation. The Lord Chancellor in putting it in these words appears to me to lay down the principle in the broadest possible way." (*Ruabon Steamship Company v. London Assurance*, 9 Asp. Mar. Law Cas. 5, 1900 A. C. 12.)

As is shown in the citation from the case given in respondent's brief, the apportionment is only made where the necessity of the owners repairs *existed prior to the collision.*

The respondent states that the rule gathered from the foregoing authorities is, that if the owner performs any work on the vessel while laid up for repairs which are a *benefit* to the vessel that it is liable to the apportionment of the damages for the demurrage. This as we have seen in all the cases, is not the real test. The

real test, and the just one, is the question of the necessity for the repairs before the collision.

The benefit received is incidental and is not regarded. It is different from the case of insurance as was said in

The Baltimore v. Rowland, 8 Wall. 377.

> "Restitutio in integrum is the leading maxim in such cases and where repairs are practicable the general rule followed by the admiralty courts in such cases is that the damages assessed against the respondent shall be sufficient to restore the injured vessel to the condition in which she was at the time the collision occurred; and in respect to the materials for the repairs the rule is that there shall not, as in insurance cases, be any deduction for the new materials furnished in the place of the old, *because the claim of the injured party arises by reason of the wrongful act of the party by whom the damage was occasioned, and the measure of the indemnification is not limited by any contract,* but is co-extensive with the amount of damage."

From the foregoing cases, and especially the cases cited and quoted from by the respondent, the apportionment of the demurrage charges is found to be based upon the question of whether the repairs would have been made in the absence of the collision, and thus the vessel detained. The repairs in this case would not have been made but for the collision.

We believe that the cases of *The Sequoia, Ruabon Steamship Company v. London Assurance Company,* and *The Acanthus,* supra, clearly show that under the facts as they exist in this case, there should be no apportionment of the demurrage charges, for, as we

have pointed out, in all of these cases it is not the question of the material benefit derived by the owner, but rather the necessity or legal obligation of the owner to make the repairs prior to the date of the collision, or in the very near future, which imposes the duty to apportion the charges, and in *The Baltimore* above, the distinction is drawn between an indemnification limited by contract and an indemnification arising from a wrongful act of the party in fault.

In the present case it is positively shown that at the time of the collision the ship was seaworthy, and that the only reason for making the repairs on the engines and overhauling the same was for examination as to the result of the collision upon her engines. As we have said, though not endorsed by the surveyors, it was an act of prudence upon the part of the owners, and though by reason of the stipulation entered into by the parties in regard to the repairs, they were bound by the advice of the surveyors and thus not entitled to receive the costs, we do not think that the owners should be penalized for taking these reasonable precautions. That should certainly be true inasmuch as the respondents have lost no time and have been put to no expense on account of it.

The making of the repairs in this case having caused the respondent no delay, no cost other than that which it was bound to pay,—the making of the repairs comes in the same category as though the owners were making a survey of the ship or washing down the decks of the vessel, and justice requires that no apportionment of the demurrage charges be made.

The suggestion of one-third off on his account in any event is unreasonable. The cost is no criterion.

Upon an entire consideration of the case, we respectfully suggest that judgment should go for the appellant as prayed for in our conclusion to the original brief, pages 49 and 50.

Dated, San Francisco,
November 25, 1922.

Respectfully submitted,

Nathan H. Frank,
Irving H. Frank,
Proctors for Appellant.